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5 The United States of America,

⁶ plaintiff,

versus 3:08 CV 709

8 Jean Cunningham, et al.,

9 defendants

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12 October 9, 2009

13 Richmond, Virginia

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15 Phone Conference

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19 Senior United States District Judge

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24 U.S. Courthouse
701 East Broad Street
25 Richmond, Virginia 23219

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5 APPEARANCES

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8 Richard Dellheim, Esq.

9 Robin E. Perrin, Esq.

10 Lema Bashir, Esq.

11 for the plaintiff

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13 Robert A. Dybing, Esquire,

14 for the defendant

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1 THE CLERK: I have joined Judge Williams
2 here. We have our court reporter, Gil Halasz,
3 well.

4 THE COURT: Okay. Identify yourselves, if
5 you will, so that Gil will have an accurate
6 record.

7 MR. DELLHEIM: This Richard Dellheim on
8 behalf of the United States.

9 MS PERRIN: Good afternoon. This is Robin
10 Perrin on behalf of the United States.

11 MS BASHIR: Lema Bashir here on behalf of
12 United States:

13 MR. DYBING: Your Honor, good afternoon.
14 Robert Dybing for the defendant.

15 THE COURT: All right.

16 Well, let me start off by asking Mr. Dellheim
17 a question.

18 I have done some preliminary research, and it
19 shows that eleven states have extended the state
20 law for accepting absentee ballots. Have you
21 studied the law governing how states extend the
22 law for accepting absentee ballots, or is it a
23 matter of right that comes under some statute or
24 their constitution?

25 MR. DELLHEIM: Your Honor, this is Richard

1 Dellheim. Good afternoon.

2 We have not conducted a survey of how states
3 pass state law to extend ballot deadlines, but we
4 would, I guess with some confidence, infer that
5 states in coordination with state election
6 authorities determine what is the most reasonable
7 method of what is the most reasonable deadlines in
8 conjunction with applicable election calendars,
9 and then pass legislation as appropriate.

10 THE COURT: Mr. Dybing, have you looked into
11 it to find out how they extend their law for
12 counting absentee ballots?

13 MR. DYBING: No, Your Honor.

14 THE COURT: Well, did you know that at least
15 eleven states have done it? And it goes, Georgia,
16 three business days; Pennsylvania, New York 20
17 days; and Virginia, being an enlightened state, I
18 am sure it would extend it for at least 20 days.

19 Have you looked into that?

20 MR. DYBING: If you are asking if I looked
21 into what other states have done, no, Your Honor,
22 I have not.

23 THE COURT: Right.

24 Well, does Virginia have a provision where it
25 could extend, say, for 30 days the counting of

1 absentee ballots?

2 MR. DYBING: No, Your Honor.

3 THE COURT: All right.

4 Well, now if I were to find that Virginia did
5 violate UOCAVA, and we know from our hearing
6 earlier this week that the United States' position
7 is that the issue of whether to count the
8 timely-requested but belatedly-received ballots is
9 not moot despite the fact that the votes will not
10 be outcome-determinative because UOCAVA protects
11 the right to vote and not the right to change
12 elections, does the Commonwealth agree with that
13 position, Mr. Dybing?

14 MR. DYBING: I am not sure I understood the
15 question, Your Honor.

16 THE COURT: Did you understand it,
17 Mr. Dellheim?

18 MR. DELLHEIM: I think I did, Your Honor.

19 If I may, it is, of course, the United
20 States' position if there is -- if The Court does
21 in fact find a UOCAVA violation stemming from the
22 November 2008 election, then the appropriate
23 remedy under UOCAVA is in fact to count the
24 ballots.

25 THE COURT: Right. But it is the position of

1 the United States that UOCAVA protects the right
2 to vote and not the right to change elections; is
3 that your position?

4 MR. DELLHEIM: That is absolutely a hundred
5 percent the United States' position.

6 THE COURT: All right.

7 What is the Commonwealth of Virginia's
8 position, Mr. Dybing? Do you agree with
9 Mr. Dellheim?

10 MR. DYBING: Only in a very general sense. I
11 think UOCAVA has carefully provided certain
12 obligations on states which Virginia has complied
13 with. And, of course, those obligations do
14 necessarily relate to the right to vote. And so
15 that much we concur, that UOCAVA is in our
16 estimation clear as to the right conferred with
17 regard to absentee voting.

18 THE COURT: But it is the right to vote and
19 not to change elections; is that your position?

20 MR. DYBING: Well, that is correct. I don't
21 see anything in UOCAVA that deals with the
22 changing of elections.

23 THE COURT: All right. But --

24 MR. DYBING: If I could be specific, Your
25 Honor. Specifically 1973-1(a)(1) obligates states

1 to permit UOCAVA voters to vote by absentee ballot
2 and to process those ballots in a certain way.
3 And so the obligation of the state, we think, are
4 clear. And those obligations do not extend to the
5 changing of elections, or it doesn't address that
6 topic.

7 THE COURT: All right.

8 Well now, to the extent that you didn't say
9 "yes," as you know the Fourth Circuit handles
10 issues of mootness much like it handles issues of
11 Article III standing, and as such for a
12 controversy to be moot it must lack at least one
13 of the three required elements of Article III
14 standing; one, injury in fact; causation; or
15 three, redressability.

16 Now, which of these three elements then do
17 you believe the United States lacks as to the
18 counting of ballots issue?

19 MR. DYBING: Well, Your Honor, I think
20 redressability was a point that we mentioned in
21 our motion to dismiss at the very inception of the
22 case. And I understand The Court did not find the
23 case moot at that juncture. But certainly our
24 position, given the state of affairs now in
25 October of 2009 that there is no effective

1 redress-ability available --

2 THE COURT: Well, let me ask you this.

3 As of now these uncounted ballots, have they
4 been shipped into Richmond and are being held in a
5 secure place? Or do you know?

6 MR. DYBING: We know the answer, Your Honor.

7 I will have the answer to you in about ten
8 seconds.

9 THE COURT: Okay.

10 MR. DYBING: They are secured in each
11 locality.

12 THE COURT: Okay. So the local registrars
13 and officials, I think they put them in a sealed
14 envelope as I recall it; is that right?

15 MR. DYBING: That's correct. That's correct.
16 Under the local electoral board. I think the
17 Virginia statute provides, Your Honor, that those
18 ballots are kept by the clerk of court.

19 THE COURT: Okay.

20 Well, let me ask you. To what extent would
21 it be costly for the Commonwealth of Virginia to
22 now have them counted and then processed in the
23 usual way? Would it be expensive, or would you
24 have to reconvene a whole lot of people? How
25 would the clerk certify that these are the actual

1 ballots that were turned over to the registrars,
2 or whatever you have in Wise County and these
3 remote localities in Virginia?

4 MR. DYBING: Your Honor, it would be
5 expensive. If I could elaborate on my answer.
6 The officers of election -- excuse me one second,
7 Your Honor.

8 There are 15,000 officers of election who are
9 involved in the certification process. And there
10 are four hundred people who are on a local
11 electoral board who then must certify those
12 results. So we are talking about a fairly
13 enormous undertaking in terms of the cost of
14 assembling those people, paying those people, et
15 cetera.

16 THE COURT: All right.

17 All right, Mr. Dellheim. How can you justify
18 putting the Commonwealth to this expense knowing
19 as we do that these votes will have no impact on
20 the election results? And what point does The
21 Court's eye for economy and the efficient use of
22 time and resources have to trump requests for a
23 year-old outcome, moot, feel-good remedy when The
24 Court has no reason to believe the Commonwealth
25 will not provide absentee ballots in time enough

1 for UOCAVA voters to cast them timely at all
2 future elections? Can you answer that?

3 MR. DELLHEIM: The United States is mindful
4 in this case, as we are in all cases, of the
5 impact on the localities of our cases. However,
6 it is clear that the right to vote is, under
7 Supreme Court case law among others, perhaps the
8 most fundamental right that an American enjoys.
9 There is evidence before this court from a Navy
10 captain explaining exactly, far more articulably
11 than I could, how important it is to him as he
12 served his country to insure that the right to
13 vote that has been stripped from him through no
14 fault of his own be restored and that his vote
15 counts.

16 MS BASHIR: Your Honor, if I may. There is
17 an election coming -- this is Lema Bashir for The
18 United States -- sorry. An election coming up on
19 November 3rd. Would it be possible to have
20 certification take place along with the
21 certification during that election to save
22 resources, if that is a problem?

23 THE COURT: Are you putting that to
24 Mr. Dybing or to me?

25 MS BASHIR: Mr. Dybing, or to you perhaps as

1 a suggestion.

2 THE COURT: Mr. Dybing, do you care to
3 comment on that?

4 MR. DYBING: I will in just a moment, Your
5 Honor. I need to refer to a source.

6 There are different officers of election for
7 the up-coming election. They switch every
8 election.

9 THE COURT: All right.

10 MR. DYBING: And they are volunteers.

11 MR. DELLHEIM: This is Richard Dellheim.

12 There must be some practical way that is as
13 mindful as we can be of conserving local election
14 officers' resources to insure that these votes
15 count.

16 THE COURT: All right.

17 MR. DELLHEIM: Miss Bashir's suggestion that
18 when the officers for the up-coming election are
19 called they do double duty and certify the
20 November 2008 election. If Mr. Dybing says that
21 is impossible, there is an election after that.
22 There must be some way to insure that these votes
23 are counted while being mindful of limited local
24 election resources.

25 THE COURT: Let me ask you another question.

1 If I order the Commonwealth to count as valid
2 the timely-requested but belatedly-received
3 absentee ballots, for how long would you have The
4 Court extend Virginia's statutory deadline beyond
5 the close of polls on November 4, 2008? And I
6 guess some guidance would be that the states that
7 have extended it go over anywhere from three days
8 to 20 days. Do you think 20 days would be a
9 reasonable period of time, or longer, or what?

10 Are you scratching your head, or didn't you
11 hear my question?

12 MR. DYBING: Are you asking me that question?

13 THE COURT: I was asking Mr. Dellheim.

14 MR. DELLHEIM: Thank you, Judge.

15 THE COURT: How long -- suppose that I order
16 the Commonwealth to count as valid the
17 timely-requested but belatedly-received absentee
18 ballots? For how long after November 4 should the
19 cut-off be?

20 MR. DELLHEIM: Your Honor, it is our view
21 that all the ballots that were received that were
22 belatedly sent out but nonetheless received should
23 be counted.

24 THE COURT: Okay. So even if they came in as
25 much as say 60 days after the polls closed on

1 November 4?

2 MR. DELLHEIM: Your Honor, there is an
3 answer. There is an answer to this question and I
4 do not have the state's data base in front of me.
5 Perhaps my colleague may be able to assist me.
6 But I believe that the last ballots were received
7 sometime in late November or early December.

8 THE COURT: Okay.

9 MR. DELLHEIM: I may be wrong about that,
10 Your Honor. But I believe that we are not talking
11 about an infinite amount of time.

12 THE COURT: Okay.

13 MS BASHIR: That is the case, Your Honor. I
14 believe that the last ballot arrived was returned
15 on December 17th.

16 THE COURT: Okay.

17 MR. DYBING: Your Honor, Bob Dybing here.

18 We don't believe that is correct. We think
19 that ballots continue to come in and came in in to
20 the spring.

21 MR. DELLHEIM: I would respond to that that
22 in the Wisconsin case that we have cited in our
23 briefs that is precisely the remedy order in
24 effect by that court. In other words, it was a
25 November election and the court ordered the state

1 to certify the results, I believe, for all ballots
2 received. And the election was not certified, I
3 believe, until the following spring. In other
4 words --

5 THE COURT: Well, Mr. Dellheim, while I have
6 you on the line, where do I get the authority to
7 make an order to modify Virginia's state law?

8 MR. DELLHEIM: I believe under the supremacy
9 clause, Your Honor. If in fact the State of
10 Virginia -- if The Court finds the State of
11 Virginia has violated federal law it is within The
12 Court's remedial authority under UOCAVA to order
13 such relief as will completely remedy the
14 violation.

15 THE COURT: Mr. Dybing, do you share his
16 views that I have that authority, or do you think
17 that it is going too far?

18 MR. DYBING: Your Honor, respectfully, we
19 contend that there is no authority in UOCAVA for
20 The Court to intrude on Virginia's electoral
21 regime, particularly with regard, particularly
22 with regard to the processing and handling of
23 absentee ballots which may have been mailed late
24 and which were received after the election day,
25 the date by which they had to be counted under

1 Virginia law. We don't see any authority in
2 UOCAVA to impose that remedy.

3 MR. DELLHEIM: Your Honor, with respect to
4 Mr. Dybing, the State of Virginia's position is
5 completely out of step with every -- with almost
6 every single state with whom we have had you
7 UOCAVA litigation. Most of our cases settled.
8 Most of the cases are settled by a federal court
9 order where states concede a violation and where
10 they also concede that the court has the power to
11 in those circumstances implement a remedy that is
12 at times contrary to state law.

13 THE COURT: All right.

14 Well, I think you have answered most of my
15 questions.

16 Mr. Dybing, anything else that you can add
17 that you think will be helpful to The Court before
18 I issue an opinion in the case?

19 MR. DYBING: No, Your Honor.

20 THE COURT: Okay.

21 Any of your associates in attendance, on both
22 sides, can you add anything that will ease the
23 burdens of The Court in deciding this case?
24 Because I will give you some sort of a medal if
25 you can make it easier for me.

1 MS BASHIR: Lema Bashir. One thing I would
2 suggest with respect to counting late-arrived
3 ballots, perhaps it would ease your mind if we
4 were looking at those that were post marked by
5 election day.

6 THE COURT: Okay.

7 MS BASHIR: As to opposed to any ballots
8 returned late.

9 THE COURT: Okay. So if one came out of
10 Afghanistan that was postmarked on November 3 or 4
11 and was received on Christmas of the following
12 year that would be counted?

13 MR. DYBING: Your Honor, Robert Dybing here.
14 Your Honor, there are no post marks on these
15 ballots. These are free mail.

16 THE COURT: Okay. So how does that affect
17 your suggestion that the postmark on them would be
18 helpful?

19 MS BASHIR: Postmark or perhaps the date with
20 the voter's signature. Something indicating this
21 is when the vote was cast by election day.

THE COURT: Will that data be on all the
ballots do you think?

24 MR. DYBING: No, Your Honor.

25 THE COURT: Well, each of you give me the

1 spin that you put on that question.

2 MR. DYBING: Robert Dybing here, Your Honor.

3 There is no date on the ballots.

4 THE COURT: All right.

5 MS BASHIR: Then I misunderstood. I
6 apologize, Your Honor.

7 THE COURT: All right. Fine.

8 Well, I will get on this as soon as I can.

9 But I can promise you in advance I am not going to
10 ruin my Columbus Day holiday on Monday by working
11 on this. I am giving each of you all permission
12 not to even think about it on Columbus Day.

13 MR. DYBING: Thank you, Judge.

14 MR. DELLHEIM: We are grateful, Your Honor.

15 THE COURT: If you can think of anything else
16 that will be helpful to you, I leave it open to to
17 to drop me a memo or something of that nature.

18 MR. DYBING: Yes, Your Honor.

19 THE COURT: All right.

20 Thank you for arranging the call.

21 MR. DELLHEIM: Thank you for your time, Your
22 Honor.

23 MS BASHIR: Thank you.

24 THE COURT: Good bye.

25 MR. DYBING: Goodbye.

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HEARING ADJOURNED.

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4 The foregoing is a true and correct transcript.

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Gilbert Frank Halasz, RMR

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Official Court Reporter

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